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IN THE SUPREME COURT OF THE UNITED STATES,

No. 1083

October Term 1957.

Now No. 117

October Term 1958.

IN THE MATTER OF THE ESTATE OF DAISY WARE BEACH, OSAGE ALLOTTEE NO. 719, DECEASED. GLADYS NAOMI WARE, an incompetent person, by JOHNNIE MOHON, her legal guardian, and JOHNNIE MOHON, as legal guardian of GLADYS NAOMI WARE, an incompetent person, *Petitioners*,

vs.

BERNARD E. BEACH, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

The respondent, Bernard Beach, prays that the petition of Johnnie Mohon, legal guardian of Gladys Naomi Ware, for a writ of certiorari to the Supreme Court of Oklahoma be denied.

The Opinion Below.

The opinion of the Supreme Court of Oklahoma was announced on June 25, 1957, and is reported in 322 P. 2d 635.

Petition for rehearing was denied by the Supreme Court of Oklahoma on the 18th day of February, 1958.

Jurisdiction.

The Petition for Certiorari Was Filed Too Late.

The petition for writ of certiorari was filed in this Court on June 19, 1959.

No application for enlargement of the time was made to this Court until June 9, 1958, twenty-one days after the time had expired. The order made on that application on June 10, 1958, provides for an extension of time to June 23, 1958, "providing the statutory time has not already expired."

The statutory time had expired on May 19, 1958. The petitioner seeks to add to that time the period during which she was seeking permission from the Supreme Court of Oklahoma to file a second petition for rehearing—which permission was denied March 11, 1958.

The time cannot be so extended. It was so decided by this Court in the case of *Gypsy Oil Company* v. *Escoe*, 275 U. S. 498, 72 L. ed. 393, from which the following is quoted, page 393:

> "November 21, 1927. *Per Curiam*: This petition for certiorari to the Supreme Court of the State of Oklahoma is denied.

"The application was not made in accordance with S. 8(a), Act of February 13, 1925, Chap. 229, 43 Stat. at L. 936, 940, U. S. C. Title 28, S. 230, which provides: 'No writ of error, appeal or writ of certiorari shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree * * *.'

"The judgment of the Supreme Court was entered March 22, 1927. A timely petition for rehearing was denied June 14, 1927. On June 18, 1927, an application for leave to file a second petition for rehearing was indorsed:

'Leave granted to file — Fred C. Branson, Chief Justice.'

"On August 2, 1927, as appears from the minutes, the following proceedings were taken by the court: '*Gypsy Oil Company* v. *Escoe, et al.* Application for leave to file a second petition for rehearing denied; application for oral argument denied. Fred C. Branson, Chief Justice.'

"On September 30, 1927, more than three months after denial of the petition for rehearing (June 14), the present petition for certiorari was filed.

"The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by the mere presentation of a motion for leave to file a second request for rehearing. *Morse* v. *United States*, 270 U. S. 151, 153, 154, 70 L. ed. 518, 519, 520, 46 Sup. Ct. Rep. 241.

"If, however, a timely motion for leave to file the second petition *is granted*, and the petition is

actually entertained by the court, then the time within which application may be made here for certiorari begins to run from the day when the court denies such second petition."

(The three months time was changed to ninety days in 1940, Title 28, Section 2101.)

Exactly the same situation prevails here. Rule 29 of the Oklahoma Supreme Court permits the asking of leave to file application to file a second petition for rehearing but does not permit of the filing without leave of the Court.

Rule 29 says:

"29. *Application for Second Petition for Replication*: (1) Within five (5) days after a petition for rehearing is denied an application for a second petition for rehearing may be made but not filed except by leave of the Court * * *."

In the reported *Gypsy Oil Company* case leave was granted to file the application for leave to file the second petition for rehearing but leave to file the second petition for rehearing was ultimately denied. That is exactly what happened here.

On March 11, 1958, this order was made (App. 36a):

"The Clerk Is Hereby Directed to Enter the Following Orders: * * * 36,581—Gladys Naomi Ware, *et al.*, v. Bernard E. Beach. Application for leave to file second petition for rehearing denied."

After the time had expired to file petition for writ of certiorari in this Court the petitioner sought to have the Oklahoma Supreme Court enlarge time by asking that

the Court clarify its judgment. Of course the judgment could not be clarified or explained. The record was already clear. The petition for rehearing had been denied on Febuary 18, 1958. The time then began to run. The petitioner sought to file a second petition but leave to file it was denied on March 11, 1958. Leave to file it was never granted and it was not "actually entertained" by the court.

The Oklahoma Supreme Court cannot extend the time for this Court or conclude for it when the time begins to run to apply to this Court for writ of certiorari.

The clarifying order says that the judgment became final when the mandate was sent to the trial court but obviously the clerical act of sending a mandate to the trial court has nothing to do with the finality of a judgment.

Nor does the stay of enforcement of the judgment to allow time to make application to this Court for writ of certiorari affect the finality of the judgment.

Nor do efforts for permission to file a second petition for rehearing affect the finality of the judgment.

Mr. Chief Justice TAFT in a similar situation, in the case of *Morse* v. *United States*, 270 U. S. 151, 70 L. ed. 581, said (from p. 154 U. S.):

> "This leave, though applied for twice, was not granted. Applications for leave did not suspend the running of the ninety days after the denial of the motion for a new trial within which the application for appeal must have been made."

Then, too, the ninety days' time actually expired again after the denial of permission to file the second petition on March 11, 1958, and before the order purporting to extend the time was made by this Court on June 10, 1958. The ninetieth day after March 11, 1958, was June 9th, and application for enlargement was filed on that day, which might be considered in time after March 11, under Rule 34, but the order made on June 10th was conditional upon the time not having already expired. As the time had actually expired there was no order extending the time.

Statement and Question Presented.

The respondent's understanding of the question presented is not as presented by petitioner. It is not believed to be a question as to the power of Congress over Indians. No one questions that power.

The Osage Act of February 27, 1925, provides in substance that heirs of Indian blood could inherit from restricted full blood Indians (App. 2a).

The respondent, Bernard Beach, and Daisy Ware, a restricted Osage Indian, were married in 1934. Daisy died May 18, 1949. Her closest blood kin was the petitioner, an incompetent sister, who has been for years confined to the Oklahoma State Hospital for the insane and whose assets equal or exceed those of her deceased sister.

Daisy's heirs at law were her husband, Bernard Beach, and this sister, Gladys Naomi Ware.

After Daisy's death and on September 1, 1950, Congress amended the 1925 Act to provide that an heir of a restricted Osage Indian in order to inherit would have to establish that he was a citizen of the United States and that he or an ancestor was on a tribal roll prepared under the direction of the Secretary of the Interior. The amendment excluded from its operation pending cases where heirs had formally alleged Indian blood (App. 2a).

The respondent claims:

1. His claim to Indian blood was actually made, sufficiently raised, and put in issue before the amendment was ever passed by Congress, and

2. That the title to the property which he had inherited passed to him some fifteen and a half months before the amendment was enacted and under the law as it existed at that time, and that Congress could not and did not intend to change the law so as to take from him property already inherited.

There Exists no Good Reason for This Court to Exercise Its Discretion in Favor of Granting Certiorari.

1. No other case has arisen calling for application of the amendment to a pending case.

The respondent knows of no other such case, and counsel for petitioner has stated that he knew of no other such case.

Therefore no precedent can be established by a decision of this case by this Court.

2. The decision of the Supreme Court of Oklahoma is important only to the litigants.

3. It does not conflict with other decisions of this Court.

4. It does not involve a Federal question of substance or one that can arise again.

5. It is is not inequitable. Bernard Beach was the husband of Daisy for sixteen years. He could not be called a "social prospector."

Bernard Beach Fully Complied With the Provision of the Amendment as to Pending Cases.

Daisy Ware Beach died May 18, 1949. The amendment was enacted into law September 1, 1950, and before the amendment became effective these things happened:

1. The guardian of petitioner Gladys Ware on April 4, 1950, filed in the County Court of Osage County, Oklahoma, her petition for appointment of the guardian as administratrix with will annexed, therein alleging that the decedent was a restricted full blood member of the Osage Tribe of Indians, and that the decedent's husband, Bernard Beach, was not of Indian blood and could not inherit and was therefore, not entitled to name the administrator (C-m. 14).

2. On April 6, 1950, Bernard Beach, the surviving husband, filed in said County Court his election to take under the law of descent of Oklahoma—as the law permitted him to do. He also filed his petition for the appointment of Paul A. Comstock as administrator. (C-m., pp. 6, 7)

3. On May 2nd, 1950, Bernard Beach testified in the County Court that he was of Indian blood (C-m. pp. 685, 686). On the same day Paul A. Comstock was appointed administrator by the County Court of Osage County, Oklahoma.

4. The petitioner, guardian of Gladys Naomi Ware, appealed from that appointment to the District Court of Osage County, Oklahoma, as to the appointment of the administrator. In the District Court the matter was tried *de novo* June 20, 1950. At that hearing these proceedings were had with Bernard Beach on the witness stand (C-m. 684):

"Bernard, are you of Indian blood?

A. Yes, I am.

Mr. Files: Just a minute, we object as incompetent, irrelevant and immaterial and not a matter before the court at this time.

The Court: Overruled, he has answered.

Mr. Files: Exception.

Mr. Gray, Did you get his answer, Mr. Harkin?.

The Court Reporter: Yes, sir.

Mr. Files: Now we move that the answer of the witness be stricken for the reason that it is incompetent, irrelevant and immaterial at this time and not within the issues before the court.

The Court: Well, I will agree this is not within the issues but it is for the record.

Mr. Files: And my motion is to strike the answer.

The Court: Yes, that motion will be sustained.

Mr. Gray: We except to the sustaining of the motion to strike the answer."

The District Court again appointed Mr. Comstock as administrator.

The guardian appealed from that judgment to the Supreme Court of Oklahoma still claiming that she was entitled to be appointed as administratrix. The trial court was affirmed. *In re Beach's Estate*, 206 Okl. 81, 241 P. 2d 390.

In the Supreme Court of Oklahoma, on the appeal in the administration matter, the petitioner in her brief contended (C-m., pp. 700-701):

"III. That Bernard Beach, the husband of the deceased, has no right or interest in the estate of the decedent unless and until he establishes that he is of Indian blood."

The respondent's answer to that contention in his brief was (C-m. 703):

"Bernard Beach the husband, has established that he is of Indian blood."

In the reply brief of the petitioner in that case she said (C-m., p. 710):

"However, the election very positively puts the question of Indian blood in issue."

Please remember that this discussion in the briefs was concerning the happenings in the trial court before the amendment in question was enacted.

The petitioner there concedes that the question of Indian blood had been put in issue in the trial court before the time of the passage of the amendment.

To further show that the question as to Indian blood had been raised in the trial court in the administration matter and before the enactment of the amendment there is quoted here a short extract from the opinion of the Supreme Court of the State of Oklahoma, in the opinion which decided the right to the appointment as administrator. *In re Beach's Estate,* 241 P. 2d 390, 393:

> "In the trial appellee testified that he was of Indian blood. On motion of appellants the answer was stricken. On this record we cannot assume that he is or is not of Indian blood. That issue is not before us."

It Was the Intention of Congress That the Heir Claim His Right to Inherit as the Oklahoma Law Provided He Should Do.

Bernard Beach filed his election to take under the law of descent and distribution at the very beginning of the proceeding and nothing more was required.

In 1912 the Osage Federal Acts made the probate law of Oklahoma, substantive and procedural, applicable to the estates of Osage Indians. Act of April 18, 1912, Sec. 3 (37 Stat. L. 86):

> "Sec. 3. That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purposes to the allottees of said tribe, *shall in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma* but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said

superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the allottee. ***"

Section 8 of the same Act reads:

"Sec. 8. That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will *in accordance with the laws of the State of Oklahoma;* Provided, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

The following is from the opinion of the Supreme Court of Oklahoma in the case *of Boyes' Estate* v. *Boyes*, 184 Okl. 438, 87 P. 2d 1102, p. 1105:

"The administration of an estate of a deceased is not an action at law nor in equity, but a probate proceeding. The duty devolves upon the county judge, acting within his probate power as such, to determine the heirs and their respective rights of inheritance, and to distribute the estate in accordance with the provisions of the will of the decedent or of the statutes of descent and distribution. No pleading setting forth a claim to any interest in the property is required (*Hetherington* v. *Falk*, 173 Okl. 437, 49 P. 2d 756)."

Bernard Beach had claimed the right to inherit. The guardian had denied the right, asserting that he did not have Indian blood. Bernard offered to prove and had proved he was of Indian blood in two courts. The petitioner interpreted the pleadings as definitely putting in

issue the question of Indian blood. Congress had made the Oklahoma law applicable to the Osages and under it nothing further was required to claim the right to inherit.

The Cases Cited by Petitioner Are Not in Point.

They have to do with the power of Congress to legislate concerning Indians, which power is not questioned.

The case of *Blanset v. Cardin*, 256 U. S. 319, cited by petitioner, is not in point because of the difference in the Acts of Congress.

In the *Blanset* case the Act involved was the Act of February 14, 1943 (37 Stat. at L. 678) which provides for Indians disposing of his property by will, "in accordance with regulations to be prescribed by the Secretary of the Interior."

The Osage Act authorizing the making of a will by an Osage Indian is Section 8 of the Act of April 18, 1912, already herein quoted, which provides for an Osage Indian to make a will "in accordance with the laws of the State of Oklahoma."

However it should be understood that in the present case there is not presented any conflict between Federal law and Oklahoma law. The question concerns one Federal Act and an amendment thereto. It is whether or not Congress intended to or could make the September 1, 1950, amendment applicable to the facts when Beach had already inherited under the provisions of the Act of February 27, 1925, which was in force at the time of the death of Daisy Ware Beach.

Neither is there a question as to the power of Congress to protect the Indians. It is simply a question of what Congress has done and if the change Congress has made operates in the future, or could be retroactive so as to destroy a vested right, and did Congress intend the Act to be retroactive.

The Amendment Changed the Substantive Law and Not the Procedure.

Please note that under the act before amendment any heirs of Indian blood could inherit. There are Indians in Canada and Indians in Old Mexico, a few of whom have appeared in the Osage as husbands of Osage Indians.

The amendment says that the Indian heir must be a citizen of the United States. The amendment then did not change the procedure by which the Indian heir of old Mexico or Canada was to prove his Indian blood. It completely and entirely prohibited him from inheriting, which he could have done had his intestate died before the enactment of the amendment.

Then, too, it is a well known historical fact that there were many Indians and many more mixed-blood Indians who were never enrolled on any roll compiled under the direction of the Secretary of the Interior. For instance, it is an historical fact that many Cherokee Indians and others of the Five Tribes in the early times went to Texas and to other states and never came back to the Indian Territory to be enrolled. Then, too, there were always some Indians who remained where they were when the Tribe was moved and such Indians were doubtless never en-

rolled. Those are all historical facts which are well known to all historical writers about Indians and appear in their writings.

There were perhaps more of such Indians and their descendants than there were enrolled Indians.

It should also be remembered that there were many Indian Bands and Tribes along the Atlantic Coast and in the northern and eastern part of the United States and that for many years the government was not interested in making rolls of the Indians and without doubt there were many individual members and even whole bands or tribes, which were never enrolled on any roll prepared under the direction of the Secretary of the Interior. In fact this country did not even have a Secretary of the Interior for nearly 300 years after Columbus discovered it and so it would have to be acknowledged that there are very many persons of Indian descent whose ancestors were not enrolled.

Now under the 1925 Act any of those persons of Indian blood, no matter of what *quantum*, could inherit from a restricted Osage Indian. See *In re Hamm's Estate*, 186 Okl. 610, 99 P. 2d 895. While under the amendment only those Indians who were on a roll of the Secretary of the Interior or who had a lineal ancestor on that roll can inherit. All such unenrolled Indians are excluded from inheritance and before the amendment they could inherit.

It is, therefore, no longer a question of evidence at all. The amendment simply divided the Indians into two classes:

1. Those who are enrolled;

2. Those who are not enrolled.

It denies those who are not enrolled the right to inherit. Theretofore such unenrolled Indian could inherit. If the unenrolled Indian had acquired the right to inherit, before the amendment was adopted, he could not be deprived of it by the amendment.

The amendment does not attempt to make a rule of evidence. It simply says that the enrolled Indians may inherit and the unenrolled Indians may not.

From 11 Am. Jur. 1198:

> "Irrespective of any express prohibition as to the enactment of retrospective laws, and, in consequence, laws which retroactively divest vested rights, the broad proposition has been laid down that the legislature cannot impair or destroy *vested* property rights, and that *even if a law is intended simply to change the remedy or procedure, it is void if in fact it impairs vested rights.*"

Also 11 Am. Jur. 1204:

> "Hence a statute is unconstitutional which in effect, either by legislative fiat or by *direct or indirect operation, takes the property of one man and gives it to another.*"

The Supreme Court of the United States has since almost the time of its creation followed the same rule. See from the opinion by Chief Justice MARSHALL, in the case of *Fletcher* v. *Peck*, 6 Cranch. 87, 3 L. ed. 162, opinion page 177:

> "Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

"The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the power of a succeeding legislature.

"The correctness of this principle, so far as respects general legislation, can never be contoverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact."

In the opinion in the case of *Downs* v. *Blount*, 95 C. C. A. 289, 170 Fed. 15, 31 L. R. A. (NS) 1076, this was said:

> *"And it is true that, under pretense of making or changing a rule of evidence, the legislature cannot deprive a party of a vested right in property."*

Bernard Beach was not without competent evidence to establish his Indian blood. He did establish it by competent evidence. Under the 1925 Act he can inherit, but under the amendment he could not inherit, not because he is not of Indian blood and not because he has failed to prove that he is of Indian blood by competent evidence, but because he is not, and his lineal ancestors were not, on a roll of the Secretary of the Interior.

It is not under the amendment, any more, even a question of Indian blood but has become a questior of who is on a roll of the Secretary of the Interior.

From 12 C. J. 956, 957 and 959:

"Sec. 487, 2. *Power of United States.* The Fifth Amendment to the Constitution of the United States which provides that no person shall be 'deprived of life, liberty or property without due process of law, secures the individual against any action of the federal government divesting vested rights.

"Sec. 507 d. *Rights of Heirs and Legatees*—(1) *In General.* During a person's lifetime his heirs, devisees, or legatees have no vested interest in his property which may not be destroyed by a statute or constitutional provision regulating the succession of property. Expectant heirs must look for their vested rights to the law in force at the time of the ancestors' death. Thus it has been held with the power of the legislature to provide that advancements previously made shall be considered a part of an intestate's estate for the purposes of distribution. Where, however, on a person's death, the rights of his heirs, devisees or legatees have thereby become vested, these rights may not be impaired by subsequent legislation."

It is apparent that Congress did not intend to pass an unconstitutional act by destroying rights which had already vested by the taking of property from one who had already acquired the title thereto.

The language of the amendment shows that there was no intention to destroy rights which had already been acquired. In fact Congress attempts to preserve those rights by providing for their preservation and Congress, perhaps unfamiliar with the Oklahoma probate procedure, had no intention of changing the Oklahoma law of procedure but did intend to say and did in effect say that in those cases where the issues were made the new amendment should not apply.

See 11 Am. Jur., p. 733:

"Sec. 100. *Restrictive Interpretation.* One important corollary of the general doctrine that it is the duty of the courts, if possible, to construe a statute so as to permit its provisions being upheld as constitutional is recognized in interpreting statutes which in their terms are broad enough to cover matters without as well as within the jurisdiction of the legislative body. • • •

"Another important corollary of the general principle is the rule that a statute need not be treated as unconstitutional or void for not containing an exception or qualification which the law will imply. The operation of a law in such cases may be restrained within constitutional limit without necessitating a decree that the act itself is void."

From the foregoing authorities it is very apparent from the language of the amendment that Congress intended to exclude from the operation of the amendment at least all of those cases in which the issues had been made prior to the enactment of the amendment, and from the foregoing authorities it is apparent that the act must be given a construction, which would not cause it to destroy rights which had already vested prior to the enactment. Actually the amendment expresses the intention not to destroy them.

Conclusion.

The writ should be denied.

Respectfully submitted,

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